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Nos. 84-1300, 84-1368, and 84-6333

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1984

EDWIN C. UDEY, PETITIONER

v.

UNITED STATES OF AMERICA

ARTHUR H. RUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA

LEONARD G. GINTER AND NORMA GINTER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence against petitioner Udey was sufficient.

2. Whether petitioner Udey was prejudiced by the district court's rulings with respect to various incidents that occurred at trial.

3. Whether the district court erred in excluding proof as to whether evidence was destroyed in bad faith by the government (petitioners Udey and Russell).

4. Whether petitioner Russell's concurrent sentences for conspiracy to harbor a fugitive and the substantive offense of harboring a fugitive violate the Double Jeopardy Clause.

5. Whether petitioner Russell has standing to seek the suppression of evidence based on an alleged violation of petitioner Leonard Ginter's *Miranda* rights.

6. Whether evidence seized during a search of the burned remains of the Ginters' house, which had been the scene of a shootout with authorities, should have been suppressed (petitioners Leonard and Norma Ginter).

7. Whether the *Miranda* rights of petitioners Leonard and Norma Ginter were violated.

8. Whether the district court erred in its evidentiary ruling that petitioners Leonard and Norma Ginter were not entitled to introduce their post-arrest statements.

9. Whether petitioners Leonard and Norma Ginter were entitled to the appointment of counsel of their choice.

10. Whether the district court abused its discretion in refusing to grant a continuance (petitioners Leonard and Norma Ginter).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a)[1] is reported at 748 F.2d 1231.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1984. Petitions for rehearing were denied on December 28, 1984 (Udey Pet. App. B1-B3; Russell Pet. App. 29a; Ginters Pet. App. D1). Udey's petition for a writ of certiorari was filed on February 13, 1985; Russell's and the Ginters' petitions were filed on February 26, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Arkansas, each petitioner was convicted on one count of conspiracy to harbor and conceal a fugitive, in violation of 18 U.S.C. 371, and on one count of harboring and concealing a fugitive, in violation of 18 U.S.C. 1071. Petitioners Udey and Leonard Ginter were each sentenced to concurrent five-year terms of imprisonment. Petitioner Russell was sentenced to a six-month term of imprisonment and a four-year term of probation. Petitioner Norma Ginter was sentenced to a term of imprisonment of time already served and a five-year term of probation. The court of appeals affirmed (Pet. App. 1a-28a).

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[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the Russell petition (No. 84-1368). The appendix to the Udey petition (No. 84-1300) is incomplete in several respects.

The charges in this case involve the harboring and concealment of Gordon Kahl. Kahl was a tax protester and a member of an extremist organization known as Posse Comitatus. In 1977, Kahl was convicted of income tax violations. Following a period of incarceration, he was released on probation in 1979. It was subsequently alleged that Kahl violated the terms of his probation, and in March 1981 a United States Marshal made an unsuccessful attempt to persuade him to surrender voluntarily. Subsequent attempts to arrest Kahl also proved unsuccessful.

On February 13, 1983, the local sheriff spotted Kahl in Medina, North Dakota. The United States Marshal was contacted and a roadblock was set up to intercept Kahl and his companions. When Kahl's group encountered the roadblock, a shootout ensued in which the United States Marshal and one of his deputies were killed; in addition, a second deputy marshal, a county sheriff, and a city police officer were injured. Kahl escaped, but his associates were arrested and convicted on various charges arising from the February 13 shootout. See *United States* v. *Faul*, 748 F.2d 1204 (8th Cir. 1984), petitions for cert. pending, Nos. 84-1373, 84-6332, and 84-6350.[2]

After Kahl escaped, warrants for his arrest on charges of murder were issued on February 14 and March 11, 1983. A nationwide manhunt for Kahl was begun, and the shootout and search were the subjects of extensive media coverage. *Faul*, 748 F.2d at 1212; Pet. App. 2a-3a.

On March 13, Kahl moved into the residence of petitioner Russell in Mountain Home, Arkansas. Kahl stayed with Russell until May 30, 1983. Dur-

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[2] The foregoing facts were taken from the court's opinion in *Faul*, 748 F.2d at 1207-1210.

ing this period, Kahl had frequent discussions with Russell and Russell's daughter, Karen Robertson,[3] regarding the shootout in North Dakota. They also watched television news accounts of the search for Kahl. Pet. App. 3a.

While Kahl was staying with Russell, petitioner Udey visited the Russell residence. On his first visit, Udey referred to Kahl as a hero. In addition, on at least two occasions Kahl went to the Udey residence near Cotter, Arkansas. One of these visits was initiated when Udey invited Kahl to dinner. Pet. App. 3a.

In mid-May 1983, petitioners Leonard and Norma Ginter went to the Russell residence. They had an FBI wanted poster of Kahl, which they discussed with him. On May 30, the Ginters and Udey were again present at the Russell residence. At that time, there was a discussion that the FBI was "closing in" on Kahl. Later that day, Kahl moved to the Ginters' residence near Smithville, Arkansas. Pet. App. 3a.

On June 3, law enforcement authorities went to the Ginter residence in search of Kahl. A shootout then occurred, and the Ginters' home was burned down in the course of the gunfight. In the charred rubble, authorities recovered the remains of a rifle similar to one Kahl had at the Russell residence and a shotgun from the United States Marshal's office in North Dakota that had been missing since the February 13 shootout. In addition, they found the burned remains of a body, which was later identified by the medical examiner as Gordon Kahl. Pet. App. 3a-4a.

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[3] Robertson was the government's principal witness at trial.

ARGUMENT

1. Petitioner Udey contends (Pet. 5-22) that the evidence was insufficient to establish that he knew that a federal warrant had been issued for Kahl's arrest. This fact-bound claim was rejected by both courts below and does not call for further review. See, *e.g.*, *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 8; *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982).[4]

In any event, the courts below correctly found that the evidence was sufficient.[5] The only element disputed by Udey is whether he had knowledge that

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[4] As Udey notes (Pet. 5), the district court stated that the evidence against Udey was not as strong as it was against the other defendants. The district court specifically concluded, however, that the evidence was sufficient to support the jury's verdict (Sentencing Tr. 24):

> The [c]ourt believes that Mr. Udey was involved in this * * *.
>
> * * * * *
>
> [T]he jury had no difficulty, apparently, in believing that Mr. Udey, beyond a reasonable doubt, did the things with which he is charged. Very frankly, Mr. Udey, the court has no difficulty believing that either * * *.

In addition, Udey's five-year sentence indicates the district court's assessment of his involvement and culpability in the harboring scheme. Finally, we note that the district court entered a judgment of acquittal with respect to Udey's wife, Irene, at the close of the government's case; this determination by the district court concerning Udey's wife, and its contrary determination concerning Udey himself, reinforces the court's conclusion that the evidence against Udey was sufficient.

[5] Chief Judge Lay dissented from the panel's decision on this issue (Pet. App. 25a-28a). In addition, he and three other judges dissented from the denial of rehearing en banc in this respect (Udey Pet. App. B1-B3).

Kahl was a fugitive because a federal warrant had been issued for his arrest. However,

> rarely would direct proof of knowledge [of the existence of a warrant] be available. * * * The knowledge element can be established by evidence from which the trier of fact "could properly infer knowledge and guilt beyond a reasonable doubt."

United States v. *Bissonette*, 586 F.2d 73, 77 (8th Cir. 1978), quoting *United States* v. *Giampa*, 290 F.2d 83, 84-85 (2d Cir. 1961); cf. *Liparota* v. *United States*, No. 84-5108 (May 13, 1985), slip op. 14. Viewed in the light most favorable to the government,[6] the evidence adequately supports the jury's findings of Udey's knowledge.

First, there was widespread media coverage of both the shootout in North Dakota and the subsequent search for Kahl. This publicity extended to the area in Arkansas in which Udey lived. See pages 3-4, *supra*; Tr. 185, 199; Gov't Exhs. 3, 3A. Indeed, Udey acknowledges (Pet. 17) that he was aware of rumors and media reports concerning Kahl.

Moreover, Udey's actions afforded a sufficient basis for the jury to infer his knowledge that Kahl was a fugitive. When Udey first met Kahl at the Russell residence, Udey said to Kahl "[y]ou're a hero" and called him by the same nickname that Russell used (Tr. 295, 308). Following the shootout at the Ginter residence on June 3, Udey told Karen Robertson that Kahl was a "good patriot" (Tr. 325) but had shot the sheriff (Tr. 326, 406). And even after the June 3 shootout, Udey expressed no surprise about Kahl's

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[6] See, *e.g.*, *Jackson* v. *Virginia*, 443 U.S. 307, 317-319, 324, 326 (1979); *Burks* v. *United States*, 437 U.S. 1, 17 (1978).

identity or status as a fugitive. In addition, Udey wrote the name "Gordon Kahl" in his Bible and made the notation "Gordon Kahl delivered" next to the passage describing St. Peter's release from Herod's prison shortly before his scheduled execution (Tr. 988-989, 994; Gov't Exh. 12).

Finally, Udey was closely involved both with Kahl and with the co-defendants engaged in harboring and concealing Kahl.[7] For example, Udey visited the Russell residence on more than one occasion while Kahl was living there and was present on the day that Kahl left to move in with the Ginters (Tr. 307, 322). Likewise, Kahl went to Udey's residence at least twice, including once in response to a dinner invitation that Udey made to Kahl and to Russell and the Ginters (Tr. 308-309, 413; Gov't Exh. 9). Contrary to Udey's contention, this evidence goes well beyond "mere association" and provides additional support for the jury's finding.

In challenging the sufficiency of the evidence, Udey places great reliance (Pet. 16-20) on an asserted ambiguity in Robertson's testimony. As the court of appeals recognized (Pet. App. 7a-9a), Robertson's direct testimony stated that Udey was involved in a discussion with Kahl and Leonard Ginter about the fact that the FBI was closing in on Kahl and that Kahl would have to leave the Russell residence;[8] this testimony provides compelling evidence of Udey's

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[7] Udey concedes (Pet. 11) that "there was extremely convincing evidence that some of the conspirators knew of the warrant [for Kahl's arrest]."

[8] This discussion occurred on the day that Kahl moved out of the Russell residence and went to live with the Ginters.

knowledge that Kahl was a fugitive.[9] Moreover, even if Udey is correct that cross-examination raised an ambiguity concerning his presence during that conversation, the jury remained free to credit Robertson's direct testimony that he was there. And at all events, for the reasons discussed above, the evidence was sufficient without regard to this testimony to allow the jury to infer Udey's knowledge of the existence of an arrest warrant for Kahl.

2. Udey argues (Pet. 28-38) that various incidents at trial constituted prejudicial error. The court of appeals summarily rejected these claims as being "without merit" (Pet. App. 24a).[10] The decision below is correct, and review by this Court is not warranted.

a. The first challenged incident involved a drawing, made by Kahl on Russell's stationery, that contained religious and racial references. Over Udey's objection that these references were prejudicial, the drawing was admitted into evidence (Gov't Exh. 8). However, as the government stated in its brief in the court of appeals (at 24), the drawing was never described or shown to the jury. See also Udey Pet. 29-30. Because the exhibit was never published to the jury, it could not have prejudiced Udey's right to a fair trial.

b. The second incident involved an allegation that a woman on the jury panel winked at the deputy marshal during voir dire. Udey complains that he

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[9] Robertson also specifically testified (Tr. 414; see Udey Pet. 19) that Udey "knew who he [Kahl] was and knew he was there [at the Russell residence]."

[10] On this and all of the subsequent questions presented by petitioners, the decision of the court of appeals was unanimous, and no judge voted in favor of rehearing en banc.

was required to use a peremptory challenge to remove that juror and thus could not strike other jurors whom he deemed unacceptable. The district court found the winking incident to be insignificant (see Udey Pet. 31). The trial court has broad discretion in the selection of jurors, and Udey has not shown either an abuse of that discretion or an impairment of his right to a fair trial. See, *e.g.*, *United States* v. *Apodaca*, 666 F.2d 89, 94-95 (5th Cir.), cert. denied, 459 U.S. 823 (1982); *United States* v. *Archie*, 656 F.2d 1253, 1259 (8th Cir. 1981), cert. denied, 455 U.S. 951 (1982).

c. During voir dire, the district court referred to public accounts alleging that the defendants were tax protesters. See Tr. 95; see also Udey Pet. 32. Udey contends that he was not a tax protester and therefore was prejudiced by the reference. However, the district court's statement was an appropriate means for eliciting from the venire panel any prejudice that might exist due to the political beliefs that underlay Kahl's crimes and the possible motives of the defendants for harboring him from law enforcement authorities. The court acted well within its broad discretion in the conduct of the voir dire (see, *e.g.*, *Ham* v. *South Carolina*, 409 U.S. 524, 527-528 (1973)) and did not deny Udey a fair trial.

d. Udey next argues that the district court erred in admitting hearsay evidence of statements by Kahl indicating that he would forceably resist arrest. See Tr. 222-223; see also Udey Pet. 33. The evidence was introduced to explain why a marshal had met with Kahl to discuss his surrender but had not endeavored to arrest him. Because this evidence was not admitted to "prove the truth of the matter asserted" (Fed. R. Evid. 801(c)), but instead was used

to demonstrate the basis for the marshal's decision not to arrest Kahl, Udey's hearsay objection is without merit. See, *e.g.*, *United States* v. *Hunt*, 749 F.2d 1078, 1084 (4th Cir. 1984), petition for cert. pending, No. 84-1481; *United States* v. *Scott*, 678 F.2d 606, 612 (5th Cir.), cert. denied, 459 U.S. 972 (1982); see also *Tennessee* v. *Street*, No. 83-2143 (May 13, 1985), slip op. 4-5.

e. Udey also complains that a relative of petitioner Russell's was observed photographing members of the jury. Based on its questioning of the two jurors involved, the district court replaced one with an alternate and determined that no other prejudice had occurred. See Tr. 1252-1266; see also Udey Pet. 34-37. That determination fell well within the district court's discretion to deal with issues of possible irregularities involving members of the jury. See, *e.g.*, *Remmer* v. *United States*, 347 U.S. 227, 230 (1954).[11]

3. Petitioners Udey and Russell contend (Udey Pet. 22-28; Russell Pet. 11-27) that the district court erred in excluding defense testimony regarding the government's alleged bad faith destruction of evidence. This contention was correctly rejected by the court below.

The manhunt for Gordon Kahl ended when he was killed by law enforcement officers in a shootout at the Ginters' residence. During the shootout, the Ginter house was burned to the ground. The charred remains of Kahl were identified by the medical examiner from teeth found in the rubble. At trial, petitioners sought to present expert testimony indicat-

[11] Relying on the arguments to be made in the petitions of his co-defendants, Udey also asserts that media publicity and courthouse security procedures deprived him of a fair trial. However, the other petitions do not present or discuss this issue, and therefore it need not be considered by the Court.

ing that government agents deliberately set the fire at the Ginters' in order to destroy fingerprint evidence that could have been used to make a positive identification of Kahl. The district court refused to admit the proffered testimony.

Initially, as the district court noted (see Pet. App. 21a n.6), the loss of the fingerprints could have aided the defendants in this prosecution, since it made it more difficult for the government to establish the identity of the body found in the Ginters' residence. It is highly implausible to claim, as petitioners do, that the government would weaken its case at trial. Nor have petitioners demonstrated why the government would deliberately destroy evidence showing whether Kahl, the subject of an intensive nationwide search, was still alive and at large.

In any event, as the court of appeals explained (Pet. App. 21a-22a), petitioners' offer of proof failed to establish that the proffered testimony was relevant. At most, petitioner's submission tended to show that the authorities caused the fire in the course of the shootout, not that they deliberately sought to destroy Kahl's fingerprints. However, the cause of the fire was neither germane to the issues at trial nor exculpatory of the defendants.[12] Accordingly, this evidence was properly excluded.

As this Court has recognized, a district court "has wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony." *Hamling* v. *United States*, 418 U.S. 87, 108 (1974). Here, petitioners' proffered testimony related to an issue entirely collateral to the charged offenses, which were established at trial by

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[12] Petitioner Udey concedes (Pet. 22) that there was "substantial and convincing evidence" that the corpse found in the Ginters' residence was that of Gordon Kahl.

proof whose sufficiency is unchallenged. In these circumstances, the district court did not abuse its discretion in excluding this defense evidence.[13]

4. Petitioner Russell received concurrent sentences of six months' imprisonment, to be followed by four years' probation, for the substantive offense of harboring a fugitive and for conspiracy to harbor a fugitive. He contends (Pet. 8-11) that this constituted multiple punishment in violation of the Double Jeopardy Clause. The court of appeals properly rejected this contention (Pet. App. 9a-11a).[14]

The Court has made clear that the propriety of cumulative punishments under the Double Jeopardy Clause is strictly a matter of legislative intent. See *Ohio* v. *Johnson*, No. 83-904 (June 11, 1984), slip op. 6 & n.8; *Missouri* v. *Hunter*, 459 U.S. 359 (1983); *Albernaz* v. *United States*, 450 U.S. 333, 343-344 (1981); *Whalen* v. *United States*, 445 U.S. 684, 691-693 (1980). "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature

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[13] The cases cited by petitioner are not to the contrary. See also *California* v. *Trombetta*, No. 83-305 (June 11, 1984). In those cases, the government destroyed documentary or other tangible evidence that was in its possession or control. In this case, by contrast, the government did not have custody of Kahl or the fingerprint evidence. Moreover, the government did not act to destroy the evidence of Kahl's fingerprints; rather, the fire occurred in the course of law enforcement activity designed to apprehend him. While petitioners may view that use of force as excessive, it plainly does not constitute bad faith destruction of evidence in the control of the government.

[14] Because petitioner was given concurrent sentences on the substantive and conspiracy counts, it is unnecessary for the Court to consider his double jeopardy claim. See, *e.g.*, *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973).

intended." *Missouri* v. *Hunter*, 459 U.S. at 366. Thus,

> the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended * * * to impose multiple punishments, imposition of such sentences does not violate the Constitution.

Id. at 368, quoting *Albernaz*, 450 U.S. at 344 (footnote omitted).

In applying this standard, the Court "has consistently relied on the test of statutory construction stated in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), to determine whether Congress intended the same conduct to be punishable under two criminal provisions." *Ball* v. *United States*, No. 84-5004 (Mar. 26, 1985), slip op. 5. Under *Blockburger*, "[t]he appropriate inquiry * * * is 'whether each provision requires proof of a fact which the other does not.'" *Ball*, slip op. 5. The *Blockburger* test turns on the statutory elements of the offense and not on the allegations of the indictment or the government's proof at trial in a given case. See *Albernaz*, 450 U.S. at 337-338; *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975).

This Court [15] and the court of appeals [16] have consistently recognized that a substantive offense and a

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[15] See, *e.g.*, *Jeffers* v. *United States*, 432 U.S. 137, 156-157 (1977) (plurality opinion); *Iannelli*, 420 U.S. at 777-779, 785-786 n.17; *United States* v. *Feola*, 420 U.S. 671, 693-694 (1975); *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961); *Pereira* v. *United States*, 347 U.S. 1, 11-12 (1954); *Pinkerton* v. *United States*, 328 U.S. 640, 643-644 (1946); *Carter* v. *McClaughry*, 183 U.S. 365 (1902).

[16] See, *e.g.*, *United States* v. *Nichols*, 741 F.2d 767, 772-773 (5th Cir. 1984), cert. denied, No. 84-985 (Feb. 19, 1985);

conspiracy to commit that offense are generally different offenses that satisfy the *Blockburger* test. Here, conspiracy to harbor a fugitive involves the necessary element of an agreement to violate the law, which is not part of the substantive offense; conversely, the substantive offense of harboring a fugitive, unlike the conspiracy offense, requires the actual consummation of the crime. Thus, these substantive and conspiracy offenses meet the test of *Blockburger*. Moreover, Russell has pointed to nothing in the language, history, or purposes of the statutes to suggest that Congress intended to depart from the settled rule that "separate sentences can be imposed for the conspiracy to do an act and for the subsequent accomplishment of that end." *Iannelli*, 420 U.S. at 777-778. On the contrary, "[t]he historical difference between the conspiracy and its end has led this Court consistently to attribute to Congress 'a tacit purpose—in the absence of any inconsistent expression—to maintain a long-established distinction between offenses essentially different'" (*id.* at 779 (citation omitted)).[17] Accordingly, Rus-

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United States v. *DeVincent*, 632 F.2d 155, 159-160 (1st Cir. 1980), cert. denied, 450 U.S. 984 (1981); *United States* v. *Bright*, 630 F.2d 804, 813 (5th Cir. 1980); *United States* v. *Bosch*, 584 F.2d 1113, 1119 (1st Cir. 1978); *United States* v. *Shelton*, 573 F.2d 917, 918-920 (6th Cir.), cert. denied, 439 U.S. 827 (1978); *United States* v. *Inmon*, 568 F.2d 326, 329-333 (3d Cir. 1977); *United States* v. *Kearney*, 560 F.2d 1358, 1365-1367 (9th Cir.), cert. denied, 434 U.S. 971 (1977); *United States* v. *Ricco*, 549 F.2d 264, 272-273 (2d Cir.), cert. denied, 431 U.S. 905 (1977); *United States* v. *Armedo-Sarmiento*, 545 F.2d 785, 791-792 (2d Cir. 1976), cert. denied, 430 U.S. 917 (1977).

[17] *United States* v. *Austin*, 529 F.2d 559 (6th Cir. 1976), upon which Russell relies, does not conflict with this analysis. *Austin* concerned convictions for bribery and for conspiracy

sell's sentences for the substantive and conspiracy offenses were not improper.[18]

5. Russell also argues (Pet. 5-8) that it was prejudicial error for the district court to admit co-defendant Leonard Ginter's statement that he had harbored Kahl. He argues that the statement was obtained in violation of Ginter's rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and *Edwards* v. *Arizona*, 451 U.S. 477 (1981).

Russell's objection to the introduction of Ginter's statement is insubstantial. The Fifth Amendment right against compelled self-incrimination is a "personal privilege" (*Fisher* v. *United States*, 425 U.S. 391, 398 (1976)), and "[t]he Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of 'physical or moral compulsion' exerted *on the person asserting the privilege*" (*id.* at 397 (emphasis added and citation omitted)). Just as the Fifth

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to engage in bribery. In that limited circumstance, the court concluded that the substantive and conspiracy offenses were the same because each involved "the same concert of action or agreement" (529 F.2d at 563). Cf. *Iannelli*, 420 U.S. at 773, 779, 782-786 (Wharton's Rule). The Sixth Circuit has confined *Austin* to that narrow situation in which the substantive offense, like the conspiracy, entails an agreement as a necessary element. See *United States* v. *Fife*, 573 F.2d 369, 372-373 (6th Cir. 1976), cert. denied, 430 U.S. 933 (1977); see also *United States* v. *Bankston*, 603 F.2d 528, 534 n.7 (5th Cir. 1979); *United States* v. *Cowart*, 595 F.2d 1023, 1033 n.14 (5th Cir. 1979). Because Russell's offense of harboring Kahl did not require any agreement or concerted action with his co-defendants, the decision in *Austin* is inapposite.

[18] There is also no basis for Russell's suggestion (Pet. 11) that offenses cannot be brought together in a single prosecution if they would not be subject to cumulative penalties. See *Ball*, slip op. 4-5 & nn.7, 8.

Amendment does not protect a person from being required to incriminate a third party (*id.* at 398), so too a third party cannot invoke someone else's privilege against self-incrimination as a basis for seeking to suppress evidence obtained in alleged violation of that person's rights. See, *e.g.*, *United States* v. *Salinas-Calderon*, 728 F.2d 1298, 1302 (10th Cir. 1984); *United States* v. *Lopez*, 709 F.2d 742, 745 n.3 (1st Cir.), cert. denied, 464 U.S. 861 (1983); *United States* v. *Penn*, 647 F.2d 876, 884 (9th Cir.), cert. denied, 449 U.S. 903 (1980). Accordingly, Russell was not entitled to challenge the validity of Ginter's statement under *Miranda*.

6. Petitioners Leonard and Norma Ginter contend (Pet. 15-30) that the evidence seized during the search of their burned-out house should have been suppressed because the warrant authorizing the search was issued without probable cause. This claim does not call for further review.

First, the validity of the search does not depend upon the challenged warrant. Although law enforcement officials went to the Ginters' residence to execute the warrant, no search occurred at that time because of the gunshots that were fired from inside the house. Rather, a search was conducted only after the shoot-out had ended and the building had burned down. As the court of appeals correctly recognized (Pet. App. 15a-16a), the entry into the charred remains of the crime scene was fully justified by exigent circumstances wholly without regard to the warrant, and the evidence of Kahl's body and his rifle, which were found in plain view, was properly seized. See *Thompson* v. *Louisiana*, No. 83-6775 (Nov. 26, 1984), slip op. 2, 4; *Mincey* v. *Arizona*, 437 U.S. 385, 392 (1978); *Michigan* v. *Tyler*, 436 U.S. 499, 509-510

(1978); *United States* v. *Singer*, 687 F.2d 1135, 1144 (1982), aff'd in relevant part, 710 F.2d 431, 432 (8th Cir. 1983) (en banc). Accordingly, even assuming that the Ginters retained a reasonable and legitimate expectation of privacy in the incinerated rubble of their house, the Fourth Amendment was not violated.[19]

In any event, the court of appeals correctly upheld the warrant issued by the magistrate for the search of the Ginters' residence (Pet. App. 12a-15a). Briefly stated, the affidavit in support of the warrant application disclosed information from a reliable informant that the informant had seen Kahl with the Ginters in a particular color and type of car on May 30, 1983, four days before the shootout and search took place. It also stated that the informant's tip had been corroborated by aerial surveillance, which showed that a car of the given description was at the Ginters' house on the afternoon of June 2 and the morning of June 3. These facts, viewed in a common-sense fashion in the overall context, provided a " 'substantial basis for * * * [the issuing magistrate to] conclud[e] that a search would uncover evidence of wrongdoing' " (*Illinois* v. *Gates*, 462 U.S. 213, 236 (1983) (citation omitted)) and demonstrated "a fair probability that * * * [the evidence sought would] be found" (*id.* at 238).[20]

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[19] A shotgun was also found during a search on the following day. The court of appeals held (Pet. App. 16a) that even if this search was not supported by exigent circumstances at the crime scene, any error in the admission of the evidence was harmless beyond a reasonable doubt. The Ginters have not challenged this harmless-error ruling.

[20] The Ginters contend (Pet. 15-18) that *Gates* should not be applied to searches, such as the one in this case, that occurred

7. Leonard and Norma Ginter argue (Pet. 31-34) that certain statements were obtained in violation of their rights under *Miranda* v. *Arizona*, *supra*, and therefore should have been suppressed. These arguments do not warrant this Court's review.

a. When the police arrived at the Ginters' home, Norma Ginter was inside. Leonard Ginter was stopped by the officers outside the house as he was driving away. At the officers' direction, Leonard called for Norma to come outside. When she did so, the officers asked the Ginters whether there was anyone else inside the house. After they responded that there was not, the sheriff entered the house. Kahl, who was hiding inside, shot and killed the sheriff (Tr. 326, 406).

The Ginters claim that their response to the officers should have been suppressed because they were not first advised of their *Miranda* rights. As they concede (Pet. 32), however, this issue was not presented in the motion to suppress, and thus the court of appeals correctly held (Pet. App. 17a) that it was not preserved under Fed. R. Crim. P. 12(b). In any event, as the court of appeals noted in the alternative (Pet. App. 17a n.4) and as petitioners appear to acknowledge (Pet. 33), the officers' questions were proper- -and hence the responses were admissible—in order "to secure [the officers'] safety [and] the safety

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before the date of that decision. They acknowledge (Pet. 18), however, that their position has been rejected by the courts of appeals and that no conflict exists on the issue. Furthermore, there is no consideration of unfairness or systemic reliance to suggest that the Court's construction of the Fourth Amendment in *Gates* should be inapplicable here and that the relevant and reliable evidence in question should be excluded at trial.

of the public." *New York* v. *Quarles*, No. 82-1213 (June 12, 1984), slip op. 9.

b. Shortly after her arrest on June 3, Norma Ginter was advised of her *Miranda* rights and invoked her right to remain silent. The following morning, she was again advised of her rights and gave a statement, which she acknowledged at the suppression hearing was not coerced; this statement was not introduced at trial. Four days after her arrest, petitioner was again given *Miranda* warnings and declined to answer any questions. On June 9, six days after her arrest, she was once more advised of her rights and made a second statement. Petitioner contends that this statement, which was admitted into evidence at trial, violated *Miranda* and *Edwards* v. *Arizona*, *supra*.

The district court found that in each instance petitioner was fully advised of her *Miranda* rights, that her waiver of those rights was knowing and intelligent, and that the statement she made that the government introduced in evidence was voluntary (Pet. App. 18a-19a; see also Ginters Pet. 31). Moreover, the court found that petitioner did not ask to be provided with counsel but only indicated that she wished to remain silent; indeed, even in that regard, petitioner " 'never stated that she intended to make no statement ever, but rather equivocally advised the authorities that she did not want to talk to them at the particular time' " (Pet. App. 19a). In these circumstances, it is clear that the officers scrupulously honored petitioner's right to remain silent [21] and that their action in recontacting her, which occurred after

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[21] See *Michigan* v. *Mosley*, 423 U.S. 96, 103 (1975); *Miranda*, 384 U.S. at 479; *Jackson* v. *Wyrick*, 730 F.2d 1177, 1179 (8th Cir. 1984), cert. denied, No. 83-7000 (Oct. 1, 1984).

the passage of a substantial period of time and involved a new set of *Miranda* warnings, did not violate *Edwards*.

8. Following their arrests, the Ginters gave various statements to the authorities. Some of these statements were used against them at trial as admissions under Fed. R. Evid. 801(d)(2)(A). The Ginters contend (Pet. 35-38) that they were entitled to introduce their other post-arrest statements as defense evidence.

This claim is without merit. Petitioners' prior out-of-court statements that they sought to introduce were clearly hearsay. Moreover, contrary to petitioners' contention, the statements were not admissible under the hearsay exception for declarations against penal interest. See Fed. R. Evid. 804(b)(3).[22] As the court of appeals noted (Pet. App. 24a), petitioners' offers of proof failed to establish that the statements were inculpatory and hence against penal interest; indeed, by seeking to introduce them, petitioners presumably believed the statements to be exculpatory rather than incriminating.[23] Nor was

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[22] Petitioners no longer raise the argument, which the court of appeals rejected (Pet. App. 23a), that certain statements made several days after the shootout were relevant and admissible as evidence of their existing state of mind or present sense impression. See Fed. R. Evid. 803(3).

[23] Rule 804 further provides that a statement against interest is not admissible unless the declarant is unavailable as a witness at trial. While a third-party witness's invocation of the Fifth Amendment renders him unavailable for purposes of the Rule (see Fed. R. Evid. 804(a)(1)), it is not at all clear that a defendant who voluntarily elects to exercise his privilege not to testify should likewise be deemed to be unavailable; unlike the situation of the third-party witness, the

there any showing that the statements were necessary to make fair and complete the post-arrest statements that the government introduced. See Fed. R. Evid. 106; *United States* v. *Soures*, 736 F.2d 87, 91 (3d Cir. 1984); *United States* v. *Crosby*, 713 F.2d 1066, 1074 (5th Cir.), cert. denied, 464 U.S. 1001 (1983); *United States* v. *Marin*, 669 F.2d 73, 84-85 (2d Cir. 1982). Finally, as the court of appeals held as an alternative ground for decision (Pet. App. 24a), any alleged error in the exclusion of these statements was harmless beyond a reasonable doubt.

9. The Ginters assert (Pet. 39-40) that they were entitled to select the lawyer to be appointed to represent them. It is well-settled, however, that a defendant does not have a constitutional right to appointed counsel of his choice. See *Morris* v. *Slappy*, 461 U.S. 1, 13-14 (1983); *Grady* v. *United States*, 715 F.2d 402, 404 (8th Cir. 1983); *United States* v. *Peister*, 631 F.2d 658, 661 (10th Cir. 1980), cert. denied, 449 U.S. 1126 (1981); *United States* v. *Brown*, 591 F.2d 307, 310 (5th Cir.), cert. denied, 442 U.S. 913 (1979); cf. *Ake* v. *Oklahoma*, No. 83-5424 (Feb. 26, 1985), slip op. 13-14. Accordingly, the court of appeals correctly rejected petitioners' claim (Pet. App. 22a).

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defendant seeking to introduce his prior statement on his own behalf has control over whether he will testify at trial. Cf. Fed. R. Evid. 804(a)(1) (last paragraph). The purpose and overall structure of the Rule suggest that it was designed to apply to statements of third-party witnesses, not to statements of parties who, in an effort to use their own out-of-court declarations, make themselves unavailable only in the sense that they elect not to testify.

10. Lastly, the Ginters contend (Pet. 41) that the district court abused its discretion in denying them a continuance of the federal trial so that they could first be tried on state murder charges arising out of the June 3 shootout at their house. This claim is unavailing.

This Court has recognized that trial courts have "broad discretion * * * on matters of continuances." *Morris* v. *Slappy*, 461 U.S. at 11; see also, *e.g.*, *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964); *United States* v. *Johnson*, 732 F.2d 379, 381 (4th Cir. 1984), cert. denied, No. 83-6953 (Nov. 26, 1984); *United States* v. *Wuagneux*, 683 F.2d 1343, 1355-1356 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983). The exercise of that discretion will be reversed on appeal only if it is "unreasoning and arbitrary" (*Morris* v. *Slappy*, 461 U.S. at 11). Here, petitioners sought an essentially unlimited continuance until such time as the state proceeding had been completed.[24] Moreover, they did not represent that they would testify at the federal trial and were deterred from doing so only by the pendency of the state charges. Cf. *Luce* v. *United States*, No. 83-912 (Dec. 10, 1984). Especially in view of the significant public interest in a prompt resolution of the federal indictment (see, *e.g.*, *Barker* v. *Wingo*, 407 U.S. 514, 519-521 (1972)), the district court did not abuse its discretion in denying the Ginters' request for an indefinite continuance.

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[24] Indeed, at the time the government's brief was filed in the court of appeals in this case, the state trial had not yet taken place (see Gov't C.A. Br. 22).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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